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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

PHILLIP IZYDORSKI,

Defendant and Appellant.

D037672

(Super. Ct. No. SCD151294)

APPEAL from a judgment of the Superior Court of San Diego County, Bernard E. Revak, Judge. Affirmed.

The trial court convicted Phillip Izydorski of forcible rape (Pen. Code, § 261, subd. (a)(2)),<sup>1</sup> forcible oral copulation (§ 288a, subd. (c)(2)), and two counts of rape with a foreign object (§ 289, subd. (a)), all with special circumstances of inflicting great bodily injury, using a deadly weapon and binding the victim (§§ 667.61, subds. (a), (c), (e)(3)(4)

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<sup>1</sup> All statutory references are to the Penal Code.

& (6), 12022.3, subd. (a), 12022.8). The court also convicted him of making a terrorist threat (§ 422). Izydorski moved for a new trial. The People opposed the motion, and before the court ruled, they moved to dismiss the special circumstance findings and enhancements. During the sentencing hearing, the court said this was one of the most difficult cases it had been involved with. It said it had no reasonable doubt of Izydorski's guilt when it convicted him but had a lingering doubt because of his vehement claim of innocence and the victim absconding. Although this information came to the court's attention after trial, the court found it did not warrant a new trial. The court sentenced Izydorski to prison for 12 years: the six-year upper term for forcible rape with a consecutive six-year upper term for forcible oral copulation. It imposed concurrent terms on the remaining convictions. Izydorski contends the trial court erred in denying his motion for a new trial.

## FACTS

On February 9, 2000, the victim (Christina) claimed Izydorski had raped and beaten her but recanted the claim at the preliminary hearing. She did not testify at trial. At trial, Detective McReynolds testified that on February 9, 2000, she spoke with Christina. At the time, Christina had a reddened eye, red marks on her neck and face and bruising on her chest. Christina told her that during the early morning hours of February 8, she and Izydorski went to a construction site to sleep. He got angry when she told him she loved him only as a friend. He repeatedly hit her. He forcibly placed a

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finger in her vagina and anus, forced her to engage in sexual intercourse and placed his belt around her neck and forced her to orally copulate him. Christina told McReynolds that at dawn the two separated and she took a bus to a friend's house and from there to the Safe Haven Center, which provides services to the homeless. Griffith Owen works at the Safe Haven Center and saw Christina on the morning of February 8 when she came to the center. Owen asked her to sign in, a regular procedure required of all visitors. Dorthy Wicker testified that she is a case manager at the Safe Haven Center. On February 8, she saw Christina, who had bruises and the redness Detective McReynolds referred to. Christina told Wicker that "Phil" had beaten her. Joan Hicks testified that during the morning of February 8, Christina came to her home and appeared battered. Christina told Hicks that Phil took her to an abandoned building where he beat and raped her. Hicks sent Christina to the Safe Haven Center to get emergency help. Officer Joycelyn Wujick testified that on the morning of February 8 she saw Christina at Sharp Memorial Hospital. Wujick noticed marks around Christina's neck and bloodshot eyes. Christina told Wujick that Izydorski caused the injuries and raped her at the construction site on State and Cedar. Izydorski told Christina he would kill her if she reported the incident. Izydorski called no witnesses.

## DISCUSSION

Section 1181 provides in part: "When a verdict has been rendered or a finding made against the defendant, the court may, upon his application, grant a new trial, in the following cases only: [¶] . . . [¶] 6. When the verdict or finding is contrary to law or evidence . . . . [¶] . . . [¶] 8. When new evidence is discovered material to the defendant,

and which he could not, with reasonable diligence, have discovered and produced at the trial."

A motion for a new trial is addressed to the sound discretion of the trial court, and the trial court's ruling will not be disturbed on appeal absent a clear showing of abuse of discretion. (*People v. McDaniel* (1976) 16 Cal.3d 156, 177.)

Izydorski argues the trial court applied the wrong standard in denying his motion, the verdicts were contrary to the evidence, and newly discovered evidence required reversal. He argues the court erroneously applied the section 1118 standard (insufficiency of the evidence) rather than the section 1181 standard (independent review). The record does not support the claim.

After the people dismissed the section 667.61 charges and Izydorski apparently abandoned his motion for a new trial, the court at sentencing spontaneously said it had no reasonable doubt when it entered the verdict, but that Izydorski's vehement claim of innocence and the victim's refusal to come to court had caused a lingering doubt. The court at no point said or indicated it was relying on the substantial evidence standard rather than the independent review standard. A lingering doubt may or may not be a reasonable doubt. Here, the lingering doubt apparently arose from information the court received after the verdict. In ruling on a motion for a new trial, the court may look only to evidence before the trier of fact when it entered the verdict. It may not grant a new trial because of evidence not before the trier of fact. (See *People v. Watson* (1983) 150 Cal.App.3d 313, 317-319.) In any case, absent an explicit statement by the trial court to the contrary, it is presumed the court properly exercised its legal duty. (*Ross v. Superior*

*Court* (1977) 19 Cal.3d 899, 913.) The record does not support Izydorski's claim that the trial court applied the wrong standard in denying the motion for a new trial.

Regarding Izydorski's claim that the verdicts are contrary to the evidence, we must affirm if the judgment is supported by substantial evidence. The court must review the entire record in the light most favorable to the judgment below and presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence. (*People v. Loomis* (1938) 27 Cal.App.2d 236, 237-238.) Here, evidence that Christina told people after the incident that Izydorski had beaten and forced her to engage in various sexual acts was admissible as prior inconsistent statements -- statements inconsistent with her testimony at the preliminary hearing (stipulated to be part of the trial record) that Izydorski did not beat or sexually assault her. Because admissible hearsay can be sufficient evidence to support a conviction (see *People v. Green* (1971) 3 Cal.3d 981, 985), the trial court did not abuse its discretion in finding that the evidence supported the verdicts.

Nor did the court abuse its discretion in rejecting Izydorski's claim that newly discovered evidence required a new trial. Section 1181, subdivision 8 authorizes the court to grant a new trial if it finds: (1) the evidence, and not merely its materiality, is newly discovered; (2) the evidence is not cumulative; (3) the new evidence would render a different result probable on a retrial; (4) the party could not, with reasonable diligence have discovered and produced it at the trial; and (5) these facts have been shown by the best evidence of which the case admits. (*People v. Beeler* (1995) 9 Cal.4th 953, 1004; *People v. Williams* (1962) 57 Cal.2d 263, 270.) Here, the purported newly discovered

evidence was a Safe Haven Center sign-in sheet that showed Christina and Izydorski signing in at the same time on February 8. Apparently Izydorski provided the court with a copy of the original sign-in sheet and the copy was difficult to read. The court was concerned that Christina's signature on February 7 appeared to be different from her printed name on February 8 and wondered if Izydorski had written both their names on the 8th to cover his conduct. The parties agreed to try to obtain the original sign-in sheet and have an expert analyze the signatures. At the next reported hearing, the court and parties discussed the inability to find Christina and compel her to come to court. The court issued a subpoena for the Salvation Army records in an effort to find Christina. The next hearing was on February 14, 2001, when the People dismissed the section 667.61 charges. On February 28, with no additional hearings, the court imposed sentence. At the outset of the hearing, defense counsel said there was no legal reason why judgment could not be imposed. The court having not ruled on the motion for a new trial, Izydorski presumably abandoned the motion after the People dismissed the section 667.61 charges. (See *People v. Rodgers* (1976) 54 Cal.App.3d 508, 517; *People v. Obie* (1974) 41 Cal.App.3d 744, 750.) When the court commented on the new trial motion during the sentencing hearing, it did not mention the purported new evidence but said it had no reasonable doubt when it entered the verdicts and "matters that have come to my attention since the decision do not qualify for a motion for a new trial."

Even if Izydorski had not abandoned the motion for a new trial, the trial court would not have abused its discretion in denying the motion.

DISPOSITION

The judgment is affirmed.

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O'ROURKE, J.

WE CONCUR:

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HUFFMAN, Acting P. J.

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McDONALD, J.